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No. 86-1419

In The
Supreme Court of the United States
October Term, 1986

State of Oregon, Department of Human Resources; Richard Ladd,

Petitioners,

v.

Coos Bay Care Center, an Oregon Corporation, Guardian Ad Litem; HANNAH SCHWANKE, Guardian Ad Litem for David and Steven Schwanke; and SANDY MAUER, Guardian Ad Litem for Tami Mauer,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Petitioners' Statement of Questions Presented is not entirely precise. The questions, more accurately put, are as follows:

1. May states which participate in Title XIX wilfully violate the federal Constitution, federal statutes and federal regulations while accepting billions of dollars in federal matching funds, and then be immune from federal judicial oversight?

2. If not, then is 42 U.S.C. § 1983 an appropriate statute to insure uniform interpretation of Title XIX of the Social Security Act?

3. Who can bring a claim challenging a state's gross and wilful violations of the mandates of Title XIX?

LIST OF PARTIES

The parties are accurately listed in the caption of the case.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit may be found in Petitioner's Appendix commencing at App-1. The opinion of the United States District Court for the District of Oregon may be found in Petitioner's Appendix commencing at App-7. The opinion of the United States Magistrate similarly may be found in Petitioners' Appendix commencing at App-9.

STATUTES INVOLVED

The statutes and regulations involved in this case include those identified by Petitioners and 42 U.S.C. §§ 1983 and 1988.

STATEMENT OF THE CASE

Petitioners' Statement is too narrow in overlooking that plaintiffs' complaint alleges plaintiffs David and Steven Schwanke and Tami Mauer, quadriplegic patients of the Coos Bay Care Center, have been deprived of that quantity or quality of care to which they are entitled constitutionally *and* by state and federal laws, statutes, and regulations. Oregon, acting through its administrator, Mr. Ladd, has chosen to participate in Title XIX of the Social Security Act. Federal Medicaid funds in the millions of dollars are accepted by the state and distributed by Mr. Ladd. Yet, Oregon and its administrator refuse to conform to the governing federal scheme as set out at 42 U.S.C. §§ 1396 *et seq.* and in regulations promulgated thereunder by the Secretary of the Department of Health and Human Services.

Petitioners' Statement also is unfortunately inaccurate where they state, at p. 6, that plaintiffs have not alleged a violation of federal law. On the contrary, plaintiffs, in paragraphs 13, 14, 15, 31, and 37 of their complaint (App-33, 37) allege that the Oregon Medicaid State Plan and the State's conduct under Title XIX are in violation not only of the Constitution, but also 42 U.S.C. § 1396a *et seq.* and 42 C.F.R. § 447.252.

Finally, it should be noted that a Motion to Dismiss was filed before any discovery took place. The Magistrate's Opinion indicates an unwillingness to "overrule" an unpublished 1982 decision authored by the U.S. District Court, District of Oregon in *Beecroft v. Atiyeh*, No. 78-1027-BU (D.Or. April 16, 1982) (App-12). That dismissal was appealed to the same District Judge who had authored

Beecroft, supra. The District Court affirmed the Magistrate in a terse opinion found at App-7, essentially affirming himself on the basis of his decision in *Beecroft* which is found at App-17. That decision involves the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 *et seq.*—a statute not involved in any way with this case.

Plaintiffs then appealed to the Ninth Circuit Court of Appeals which held, *inter alia,* that "Medicaid patients and health-care providers have parallel interests" and may stand as co-plaintiffs. (App-5). From that decision the Petitioners have come before this Court.

SUMMARY OF ARGUMENT

1. The Petitioners have not identified the types of reasons for granting a petition for writ of certiorari as contemplated by the Rules of this Court. Specifically, Title XIX creates rights which may be enforced through 42 U.S.C. § 1983. The states cannot, on the one hand, accept billions of Medicaid dollars, and then on the other, flagrantly violate the Constitution and the federal laws creating and implementing Title XIX without the scrutiny of federal courts, as they argue. Nor are plaintiffs required to exhaust state remedies which are, as here, clearly futile.

2. There is no split of authority among the Circuit Courts of Appeal on any issue presented here.

ARGUMENT

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO GRANT CERTIORARI

A. The Decision Below Considered the Relevant Issues and Correctly Decided Them.

The Petitioners have somehow misconstrued Respondents' causes of action, and badly at that. The Petitioners state at p. 6 of their brief: "Plaintiffs' complaint did not claim that Oregon's Medicaid plan itself violates federal law." Yet, we find clearly stated in the complaint allegations at paragraphs 13, 14, and 15 that the "State Plan" adopted by each state participating in the Title XIX program must meet certain *federal* requirements. Then, at paragraph 31, Respondents allege a failure of the State Plan (or State conduct) to comply with *federal* law. Nothing could be plainer. (App-33, 37).

Petitioners have also conveniently overlooked the guardians ad litem who seek to bring this action on behalf of three named individuals who are functional quadriplegics and who reside at the Coos Bay Care Center. More precisely, the case is brought for the named individuals and for the class they represent. (App-35, 36). Yet, like the Attican giant, Procrustes, Petitioners measure plaintiffs' complaint on their iron bed and lop off whatever does not fit their theories of this action. At least one-half of this case has not even been addressed in Petitioners' Petition.

Further, Respondents allege a deprivation of constitutional rights *and* their federal statutory rights at paragraph 37 of their complaint. Since the trial court granted

a Rule 12(b) Motion to Dismiss, the allegations of plaintiffs' complaint must be regarded as true. *See, e.g., Hughes v. Rowe,* 449 U.S. 5 (1980). Therefore, it must clearly be seen that Petitioners seek by their brief to ask this Court to deny access to the federal courts when federal statutes, federal regulations, and the federal Constitution have been violated by a state official acting under color of state law. Given this set of facts, it is understandable why Petitioners and their *amici* would prefer the benign comfort of their own "remedies" while avoiding the more rigorous climate which will usually be found in a federal court which interprets federal law.

Medicaid is indeed a joint federal/state enterprise, and a large one at that.[1] Providers of health care services are solicited by the states to participate in rendering care to those indigent persons who are eligible. The providers come forward and commit their resources, both human and capital, towards implementing the spirit and intent of a federal statute (42 U.S.C. § 1396a *et seq.*) made more clear, more specific, by hundreds and hundreds of federal regulations. (*See,* generally 42 C.F.R.) While states have some flexibility in their implementation of their individual Medicaid programs, each state, like it or not, is tethered to the federal requirements beyond which they may not go. *Harris v. McRae,* 448 U.S. 297, 103 S.Ct. 683 (1980). There is a responsibility which comes with the federal match and

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[1]Under current law, federal and state governments are expected to spend $25.9 billion and $21.3 billion respectively in 1987 to finance health care for indigent Americans. Office of Management and Budget, Executive Office of the President, Budget of the United States Government, at 5-102 (Fiscal Year 1987).

when there is a question as to whether that state responsibility has been entirely violated, can the states be heard to say that the federal courts are powerless to decide the question? Apparently they would like to confuse sovereignty with license; they refuse to accept the rather clear instruction from the Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980) and, most recently, in *Wright v. City of Roanoke Redevelopment and Housing Authority*, — U.S. —, 107 S.Ct. 766 (1987).

The task of the Ninth Circuit Court of Appeals in rendering the decision below was a relatively simple one. All it was required to do was follow well-established and clear principles set forth by this Court. Taking the allegations of the complaint as true, the issue was simply whether 42 U.S.C. § 1983 and its "and laws" provision gives rise to a private right of action in connection with alleged violations by the state of Title XIX of the Social Security Act, 42 U.S.C. § 1396 (1982 & Supp. III 1985), and the implementing federal and state regulations. The Court of Appeals answered in the affirmative. The task was relatively simple because this Court had in *Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 2054, 65 L.Ed.2d 555 (1980), held that 42 U.S.C. § 1983 does provide a basis for actions to compel participating states to comply with provisions of the Social Security Act, of which the "Medicaid" statute in question here is a part.

Actually, the *Maine v. Thiboutot* decision is part of an unbroken chain of decisions finding § 1983 available as a vehicle to enforce various provisions of the Social Security Act. In support of its conclusion that "suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the participat-

ing states," *Maine v. Thiboutot, supra,* 448 U.S. at 4, *quoting Rosado v. Wyman,* 397 U.S. 397 (1970), the Court noted:

> While some might dismiss as dictum the foregoing statements, numerous and specific as they are, our analysis in several § 1983 cases involving Social Security Act (SSA) claims has relied on the availability of a § 1983 cause of action for statutory claims. . . . *Miller v. Youakim,* 440 U.S. 125, 132, and n. 13, 99 S.Ct. 957, 963, 59 L.Ed.2d 194 (1979) (state foster care program inconsistent with SSA); *Quern v. Mandley,* 436 U.S. 725, 729, and n. 3, 98 S.Ct. 2068, 2072, 56 L.Ed.2d 658 (1978) (state emergency assistance program inconsistent with SSA); *VanLare v. Hurley,* 421 U.S. 338, 95 S.Ct. 1741, 44 L.Ed.2d 208 (1975) (state shelter allowance provisions inconsistent with SSA); *Townsend v. Suank,* 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971) (state prohibition against AFDC aid for college students inconsistent with SSA); *King v. Smith,* 392 U.S. 309, 311, 88 S.Ct. 2128, 2130, 20 L.Ed. 2d 1118 (1968) (State cohabitation prohibition inconsistent with SSA). Cf. *Hagan v. Lavine,* 415 U.S. 528, 532-533, 543. 94 S.Ct. 1372, 1376-1377, 1382, 39 L.Ed.2d 577 (1974) (District Court held jurisdiction to decide whether state recoupment provisions consistent with SSA); *Carter v. Stanton,* 405 U.S. 669, 670, 92 S.Ct. 1232, 1233, 31 L.Ed.2d 569 (1972) (District Court had jurisdiction to decide whether state absent-spouse rule consistent with SSA).

Id., 448 U.S. at 6. *See also, Edelman v. Jordan,* 415 U.S. 651, 675 (1974).

Various federal circuit and district courts have therefore had little difficulty in exercising jurisdiction over claims founded upon Medicaid violations. *See, e.g., Nebraska Health Care Association v. Dunning,* 778 F.2d 1291, 1295-96 (8th Cir. 1985) *cert. denied,* — U.S. —, 107 S.Ct.

947 (1987) (state statute regulating reimbursement to providers of nursing home services found in violation of federal regulations and the "Boren Amendment," 42 U.S.C. § 1396a(a)(13)(A), complaint properly characterized as an action under 42 U.S.C. § 1983); *Yapalater v. Bates,* 494 F.Supp. 1349, 1358 (S.D.N.Y. 1980), *aff'd,* 644 F.2d 131 (2d Cir. 1981), *cert. denied,* 455 U.S. 908, 102 S.Ct. 1255, 71 L.Ed.2d 447 (1982) (a provider, who claims that State's "wrongful administration of the Medicaid program . . . deprives him of reimbursement to which federal law entitles him" has a remedy by virtue of "§ 1983 as interpreted by the *Thiboutot* majority"); *Washington State Health Facilities Association v. State of Washington Department of Social and Health Services,* 698 F.2d 964 (9th Cir. 1982) (state enforcement of a regulation which deviated from the federally approved state Medicaid plan enjoined); *Illinois Hospital Association v. Illinois Department of Public Aid,* 586 F.Supp. 360 (N.D. Ill. 1983); *Thomas v. Johnston,* 557 F.Supp. 879 (W.D. Tex. 1983) (§ 1983 action to enforce reimbursement provisions of 42 U.S.C. § 1396a(a)(13)(A) and federal regulations).

While this Court narrowed the scope of § 1983 availability somewhat in the *Pennhurst* decision, *Pennhurst State School and Hospital v. Halderman,* 654 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), that decision in no way negated *Maine v. Thiboutot* nor altered its continued application to Social Security Act violations.

Petitioners have stated no cogent reason for reconsidering and overruling the narrow, but well settled principle of *Maine v. Thiboutot* as applied to the patients and provider of health care now before this Court.

Because the District Court had engaged in a *Pennhurst* analysis to arrive at its erroneous conclusions, (and probably out of an abundance of caution), the Ninth Circuit did examine the case under *Pennhurst* principles, even though it was not necessary to its holding. That is, it held that "*Thiboutot* rather than *Pennhurst* governs this case and it was not necessary [for the District Court] to engage in a *Pennhurst* analysis." Petitioners' App-2. After reviewing the case under *Pennhurst,* the Court was compelled to find that "[e]ven if *Penhurst* properly applies here, these plaintiffs can enforce 42 U.S.C. § 1396a (a)(13)(A)." *Id.*

In connection with its *Pennhurst* review, and particularly with respect to the "second *Pennhurst* exception", which "examines the character of the 'right' created by a federal statute," the Ninth Circuit found it appropriate to "borrow" from the *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), "implied right of action" theory. Under this analysis, the Court stated that "if a plaintiff is one of a class for whose especial benefit a statute was enacted, and if Congress has not expressly proscribed private actions to enforce the benefit, the entitlement will support a plaintiff's § 1983 action." Petitioners' App-4. Although stated somewhat differently, this was essentially the Court's approach in the recently decided case of *Wright v. Roanoke Redevelopment and Housing Authority,* — U.S. —, 107 S.Ct. 766, 770-71 (1987). Again, it should be noted that the analysis in *Wright* presupposes the necessity of a *Pennhurst* examination, a point which Respondents do not concede as appropriate here. However, even if examined under a *Pennhurst* approach as explained by *Wright,* it becomes clear that the Ninth Circuit's decision was correct.

As the Court stated in *Wright v. Roanoke Development and Housing Authority, supra,* 107 S.Ct. at 771,

> If there is a state deprivation of a 'right' secured by a federal statute, § 1983 provides a remedial cause of action unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement.

The Petitioners in this case, therefore, have the burden of demonstrating the requisite "congressional intent to preclude the remedy of suits under § 1983," and that "Congress specifically foreclosed [such a] remedy . . . ." *Id.,* quoting *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.,* 453 U.S. 1, 20, 101 S.Ct. 2615, 2626, 69 L.Ed.2d 435 (1981); *Smith v. Robinson,* 468 U.S. 992, 1004-1005, n. 9, 104 S.Ct. 3457, 3465-3466 n. 9, 82 L.Ed.2d 746 (1984). This they have not done and cannot do. They neglect to point out that if Congress wished to deny access to the federal system it could have included such a denial in Title XIX. But this Congress did not do. It has been approximately seven years since *Maine v. Thiboutot* was decided. If Congress was offended by this Court's interpretation of their intent, then Congress could have made that disagreement known in the six succeeding sessions since *Thiboutot.* As this Court has recognized, the silence of Congress can give rise to an indication of the Congresional intent. *See, Graves v. People of State of New York,* 306 U.S. 467, 479 (1939).

In determining whether Congress has foreclosed a private remedy. the Court must, of course, first look "at the language of the statute." *Daily Income Fund, Inc. v. Fox,* 464 U.S. 523, 534, 104 S.Ct. 831, 78 L.Ed.2d 645 (1984).

The statute in question here, 42 U.S.C. § 1396a(a)(13)(A), states in pertinent part, that a state plan for participants in the federal medicaid plan must, among other things:

> (13) provide—
>
> (A) for payment . . . of the hospital, skilled nursing facility, and intermediate care facility, services provided under the plan through the use of rates . . . which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in accordance with applicable State and Federal laws, regulations, and quality and safety standards, and to insure that individuals eligible for Medicaid assistance have reasonable access . . . .

Certainly nothing in the statute itself forecloses a private right of action.[2] Indeed, with its requirement of payment rates to providers of health care which will "meet [their] costs," when they are "efficiently and economically operated," Congress unmistakenly appears to place the provider within "the class for whose *especial* benefit the stat-

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[2]HCFA, the entity of HHS responsible for Medicaid reimbursement matters, apparently agrees that the federal courts are to be utilized in Medicaid reimbursement matters:

> Since the Medicaid program is State administered, it is neither appropriate nor administratively feasible to establish a Federal appeals process outside the current State administrative procedures or the State *and Federal* civil court systems. Finally, absent any statutory mandate, there is no Federal authority to require judicial recourse for providers dissatisfied with State payment rates. Of course, under both the current and revised regulations, providers are free to pursue whatever judicial remedies are available in their States after they have exhausted the administrative appeal process. (Emphasis added)

See 48 Fed. Reg. 56047 (December 19, 1983).

ute was enacted." *Cort v. Ash, supra,* 422 U.S. at 78, *quoting Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33, 39 (1916). The Ninth Circuit correctly reasoned that *both* Medicaid patients *and* providers, both plaintiffs in this action, "have parallel interests with respect to Medicaid funding and reimbursement." Petitioners' App-5. *See, Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed. 2d 891 (1984) (upheld award of attorneys' fees pursuant to § 1988 in a case brought under § 1983 on behalf of Medicaid recipients.)

In *Yapalater v. Bates,* 494 F.Supp. 1349 (S.D.N.Y. 1980) *aff'd.* 644 F.2d 131 (2d Cir. 1981) *cert. denied,* 455 U.S. 908, 102 S.Ct. 1255, 71 L.Ed. 2d 447 (1982), the District Court rejected the defendants' contention "that under the *Cort* analysis, plaintiff as a welfare *provider* has no federal right of action for an alleged violation of the Social Security Act under color of state law." (Emphasis original). *Id.* at 1355. Finding that the plaintiff is furnished a remedy under § 1983, and that the defendants' *Cort v. Ash* argument "goes to the merits" rather than to jurisdiction, the Court held:

> . . . within the § 1983 context, it distorts reality to characterize plaintiff as nothing but a "provider." To be sure, it was as a "provider" that plaintiff furnished Medicaid service; but the case at bar turns upon the legal measurement of his reimbursement. Thus he may be just as accurately described as a "recipient of reimbursement."

It is certainly the *provider,* not the patient, that must "incur costs" in providing care in conformance with federal and state laws and regulations. It is the *provider* which must conduct his operations in an "efficient and

economic'' manner so as to be eligible for reimbursement. It is the *provider* that has the economic stake in making certain that state Medicaid plans, at least their reimbursement aspects, are conducted in accordance with the federal statute and regulations.

Because *Maine v. Thiboutot* is applicable to the narrow situation in which Social Security Act violations are at issue, and also because the outcome of this case would be the same even if tested by the alternate *Pennhurst* approach with its reference to *Cort v. Ash,* and in light of the recent *Wright* decision, it would certainly be an ill-advised use of the Court's scarce time and resources to re-examine this matter.

B. No True Conflict Exists Between the Circuit Courts of Appeals With Respect To the Precise Issues Presented Here

Petitioners cite *Oberlander v. Perales,* 740 F.2d 116 (2d Cir. 1984) in support of their contention that ''lower federal courts have reached different conclusions on the availability of § 1983 relief for alleged medicaid rate violations.'' Petition at 16. However, that case turned on the Court's determination that the plaintiffs' allegations were limited to the ''state authority's failure to comply with *state regulations.*'' *Oberlander v. Perales, supra,* 740 F.2d at 119. Despite Petitioners' attempt to characterize the complaint in this case as pertaining only to state regulatory violations, *see, e.g.,* Petition at 6, as mentioned previously, a reading of the complaint itself leads to a contrary conclusion. Petitioners' App.-31-38. Clearly, a violation of the federal statutes and regulations is alleged and, at this point at least, must be accepted as true. *Hughes*

v. Rowe, supra. The Medicaid portion of Title XIX, perhaps more than many of the other portions of that Title already specifically recognized by this Court as within the federal court's jurisdiction, can be characterized as pervasively regulated by the federal government. *See, e.g.,* 42 C.F.R. § 431.1 *et seq.* While it is certainly true that the Medicaid program is a cooperative federal-state effort, the majority of the funding comes from the federal government. "Although participation in the Medicaid program [by a state] is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX." *Harris v. McRae,* 448 U.S. 297, 301 (1980).

The Title XIX requirement at issue in this case concerns the federal statutory and regulatory requirement that providers of health care under the various Medicaid programs be reimbursed at rates which are:

> reasonable and adequate to meet the costs which must be incured by efficiently and economically operated facilities in order to provide care in conformity with applicable state and federal laws, regulations and quality and safety standards.

42 U.C.S. § 1396a(a)(13)(A). *See also,* 42 C.F.F. § 447.250-447.253. The crux of the Complaint in this case was that the payment rates established by Oregon pursuant to its participation in the Medicaid program were not reasonable or adequate to meet the costs which were required to be incurred by the provider to provide care in conformity with federal and state standards for certain patients who require specialized or extra care, or as the state has termed it, "heavy care." The fact that the state has regulations

which also purport to require payment for these "heavy care" patients, and of which it may also be in violation, no way transforms the federal statutory obligation into a matter of purely state law.

As one Court has observed:

> The Social Security Act and its history evidences no legislative intent that disputes over changes of reimbursement methods between Medicaid providers and states be governed solely by state law.

Washington State Health Facilities Association v. State of Washington Department of Social and Health Services, 698 F.2d 964, 965 n. 4 (9th Cir. 1982).

The Eleventh Circuit in *Silver v. Baggiano,* 804 F.2d 1211, 1214 (1986) illustrated this point nicely in construing *Barnes v. Cohen,* 749 F.2d 1009 (3rd Cir. 1984), *cert. denied,* 471 U.S. 1061 (1985):

> In *Barnes,* the Third Circuit found that state officials were not adhering to their own regulations regarding their Aid to Families with Dependent Children ("AFDC") program. As a result, the court found that the state officials were violating the state AFDC plan. Moreover, since the federal AFDC statute requires that state AFDC plans "be in effect in all political subdivisions of the State, and if administered by them, be mandatory upon them," 42 U.S.C. § 602(a)(1), the Third Circuit held that state officials, by not adhering to their own regulations, had violated the state plan and thus had violated the federal law which makes the state plan mandatory. Therefore, because state officials were alleged to have violated federal law by not complying with state law, the Third Circuit decided that *Pennhurst II* was inapplicable.

While it may be true that an Oregon Medicaid regulation is involved in this action, the purpose of the regulation is to implement *federal* law which governs the state plan for Medicaid. And it is precisely the action/inaction under color of state law which uniquely violates those *federal* laws set forth clearly in plaintiffs' complaint and which clearly allows a § 1983 proceeding.

The fact that Congress repealed the statutes formerly requiring an Eleventh Amendment immunity waiver by States participating in the Medicaid program, 42 U.S.C. § 1396(g) (repealed), in no way alters the jurisdiction of the federal courts. It simply means that retroactive, monetary relief against a state may not be obtained in federal court. "The repealer does not affect the [provider's] right to prospective injunctive relief." *Hospital Association of New York State v. Toia,* 435 F.Supp. 819, 825 (S.D.N.Y. 1977) *referring to* Sen. Rep. No. 94-1240, U.S. Code Cong. and Admin. News, p. 5648 *et. seq.* (1976). Thus, reliance by Petitioners upon the repealer statute and the *Toia* decision in support of its contention that there is a Congressional preference for "state level" litigation of reimbursement claims is unfounded. In *Toia* itself, the federal judgment was vacated only "insofar as it award[ed] plaintiffs monetary relief against the State." *Id.* at 832. In this case, then, the federal court may clearly proceed upon plaintiffs' claims for declaratory and injunctive relief.

The *Oberlander* Court, in fact, correctly stated the applicable rule. "Suits in federal court under § 1983 are proper to secure compliance with provisions of the Social Security Act on the part of participating states." *Ober-*

lander v. Perales, 740 F.2d 116, 119 (2d Cir. 1984) *quoting Maine v. Thiboutot, supra,* 448 U.S. at 4. Again, the Second Circuit's specific holding was based upon its finding that a state regulation *alone* was at issue. The Ninth Circuit had little difficulty in this case recognizing that "*both* state laws and Title XIX of the Social Security Act" are at issue. Petitioners' App-1. In reality, then, there is no conflict between the Ninth and Second Circuits.

The *absence* of conflict is further seen by the Second Circuit's more recent decision in *Rose v. Heintz,* 806 F.2d 389 (1986). The case involved an award of attorney's fees pursuant to 42 U.S.C. § 1988 based upon the successful prosecution of a § 1983 claim against a state official and a Connecticut state agency. The case arose under Title XIX of the Social Security Act, specifically 42 U.S.C. § 1396a(a)(10)(A), and resulted in a judgment against the state defendants based on their Medicaid policy actions, which the Second Circuit noted were under color of *both* state and federal law. *Id.,* at 392. Contrary to Petitioners' assertions, then, (Petition 22) the Second Circuit does *not* conclude that claims seeking to enforce a state's compliance with its Medicaid plan raise no questions of federal law. Petitioners see a conflict where none exists.

Petitioner also cites some district court decisions in support of its contention that a conflict of authority exists among the circuits. However, Rule 17, Rules of the Supreme Court refers only to "conflict[s] with the decision of *another federal court of appeals,*" and thus a conflict among district courts, even if such a conflict exists, is not within the coverage of the rule at all. Indeed, it has been suggested that:

> [T]he existence of differing rules of law in different sections of our great country is not always an intolerable evil . . . experience with conflicting interpretations . . . may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce desireable results.

Stevens, J. *Some Thoughts on Judicial Restraint,* 66 Judicature 177, 183 (1982). Therefore, even if it could possibly be agreed, arguendo, that a conflict exists between the Second and Ninth Circuits, the "conflict" appears to be a "tolerable" one.

II. PETITIONERS' "EXHAUSTION" CONTENTION DOES NOT MERIT THE COURT'S REVIEW

This Court has made it clear that administrative remedies need not be exhausted as a prerequisite to bringing an action under § 1983. *Patsy v. Board of Regents,* 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); *Thomas v. Texas State Board of Medical Examiners,* 897 F.2d 453 (5th Cir. 1987). In particular, exhaustion will not be required where resort to administrative remedies would be "futile". *See, e.g., Smith v. Illinois Bell Tel. Co.,* 270 U.S. 587, 46 S.Ct. 408, 70 L.Ed. 2d 747 (1926); *United States Alkali Export Association v. United States,* 325 U.S. 196, 65 S.Ct. 1120, 89 L.Ed.2d 1554 (1945). The uncontroverted record in this case demonstrates that the "futility" rule applies here.

During the proceedings in the District Court, plaintiffs submitted the affidavit of Robert Decker, one of the principals in Coos Bay Care Center, Inc. The affidavit

also became part of the record presented to the Ninth Circuit Court of Appeals, and is set forth herein as Respondent's Appendix-1 *et seq.* The affidavit, in pertinent part states:

> Your affiant has been advised repeatedly that although these patients do require heavy care, that there is no money available to meet these patients' needs which would be indicated by federal law. *Your affiant has been told by these Oregon state officials that it would be futile to pursue any type of administrative procedure or administrative remedy and that, in fact, no administrative procedures were available to your affiant or to his patients which could address this type of problem.* Your affiant has further been told that no request for additional funding will be made by the State of Oregon for heavy care patients and, accordingly, your affiant has come to this court for relief under the federal jurisdiction and pursuant to federal law.

(Emphasis added). Nowhere in any of the proceedings below did Petitioners, by way of affidavit, argument or otherwise, even attempt to refute Mr. Decker's assertions. A Court may always exercise its discretion in determining whether exhaustion is required in a given case. *McKart v. United States,* 395 U.S. 185, 200-01, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); *Natural Gas Pipeline Co. v. Slattery,* 302 U.S. 300, 58 S.Ct. 199, 82 L.Ed.2d 276 (1937). Given the facts and circumstances of this case, including the unrefuted assertions referred to above, plaintiffs can hardly be faulted for resorting to the courts. Indeed, in the face of the position of the state, resorting to state remedies would seem to be the very height of futility. *Lopez v. Heckler,* 725 F.2d 1489, 1501 (9th Cir. 1984) *Citing Wein-*

berger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975).

CONCLUSION

Chief Justice Marshall observed that a federal court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given" in *Cohens v. Virginia,* 6 Wheat 264 (1821). Now, as then, federal courts must take up federal questions.

Petitioners and their *amici* argue that floodgates will open and the federal courts will be swamped if plaintiffs are allowed to go forward. Though the federal decisions cited above favor plaintiffs' position, it should be noted that these cases are not that abundant, much less overwhelming. This Court correctly observed in a Medicare context, *Bowen v. Michigan Academy of Family Physicians,* — U.S. —, 106 S.Ct. 2133 (1986):

> We do not believe our decision will open the floodgates to millions of Part B Medicare claims. Unlike the *determinations* of amounts of benefits, the *method* by which such amounts are determined ordinarily affects vast sums of money and thus differs qualitatively from the "quite minor matters" review of which Congress confined to hearings by carriers. In addition, as one commentator pointed out, "permitting review only [of] . . . a particular statutory or administrative standard . . . would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case." Note, 97 Harv.L.Rev. 778, 792 (1984) (footnote omitted). We observed no flood of litigation in the first 20 years of

> operation of Part B of the Medicare program, and we seriously doubt that we will be inundated in the future.

Id., at 2131, fn.11. Like *Bowen, supra,* this case does not involve a single reimbursement decision, but a policy and continued *method* of denying the operation of federal laws under color of state law. Hopefully, the *amici* states' Medicaid systems are consonant with federal law. If so, there should be no wholesale stampede to the federal courthouse nearest their state capitals, and their concern with federal oversight is probably unwarranted.

From the point of view of the federal majority partner in Medicaid matters, is it not better to avoid 50 different interpretations of what federal law requires? That is to say, there is an absolute *necessity* for federal jurisdiction here to promote consistency in the responsible discharge of federally imposed duties. There is a logical consistency here. The Social Security Act must be implemented and judged by federal decisionmakers. That was recognized in *Maine v. Thiboutot* and has caused no unnecessary strains on the federal judiciary to date.

The Court should refuse to grant Petitioners' request for Certiorari because: (1) the issues presented in Petitioner's Petition were considered and correctly decided by the Ninth Circuit, (2) no actual conflict exists between the Circuits with respect to the precise issues presented herein, and (3) the doctrine of exhaustion of administrative remedies has no application here.

Respectfully submitted,

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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OREGON

Civil No. 84-6178-C

COOS BAY CARE CENTER, an Oregon corporation, (Guardian Ad Litems); HANNAH SCHWANKE, Guardian Ad Litem for David and Steven Schwanke; and SANDY MAUER, Guardian Ad Litem for Tami Mauer, on their own behalf and on behalf of a similarly situated class of individuals,

Plaintiffs,

vs.

STATE OF OREGON, DEPARTMENT OF HUMAN RESOURCES; RICHARD C. LADD in his official capacity as Administrator of the Senior Services Division of the Department of Human Resources,

Defendants.

AFFIDAVIT OF ROBERT DECKER IN OPPOSITION TO MOTION TO DISMISS

STATE OF OREGON)
) ss.
County of Marion)

COMES NOW, ROBERT DECKER, and being first duly sworn upon his oath, deposes and says:

That he is one of the owners of the Coos Bay Care Center, Inc., plaintiff herein.

That your affiant has been involved in rendering services to the developmentally disabled since at least 1962.

That he is the former director of the Idaho State School and Hospital for the developmentally disabled in the State of Idaho and that he is the former assistant director of the State of Utah, State Training School for the developmentally disabled during the years 1962 to 1969.

That your affiant is extensively involved with intermediate care facilities for the developmentally disabled in his capacity as Executive Vice President of Chartham Management, Inc., headquartered in Salem, Oregon. The principal business of Chartham Management, Inc., is to provide management services to health care facilities in the Western United States.

Your affiant knows of his own knowledge that the Coos Bay Care Center has been managed by Chartham Management, Inc., and owned by the present ownership since April of 1982. At that time, there were heavy care patients who were being reimbursed at the same rate as intermediate care patients at the Coos Bay Care Center.

Heavy care patients, as defined in Section 411-70-030, *Oregon Guide for Title XIX, Medicaid Assistance Programs,* by virtue of their disabilities, require a significant

amount of health care, attention, feeding, grooming and other services which exceed that demanded by the normal intermediate care patient.

That since April of 1982 and with respect to the heavy care patients who were in the facility in April of 1982 and those who have been admitted since, your affiant has discussed the need for additional reimbursement for the care given and for the care required by these patients. These needs have been discussed many times with the defendant, Richard C. Ladd, with Mr. Joe Morgan, assistant director of mental health for the State of Oregon, Mr. Bob Zigan, assistant director of senior services division, State of Oregon and various members of their staff.

Your affiant has been advised repeatedly that although these patients do require heavy care, that there is no money available to meet these patients needs which would be indicated by federal law. Your affiant has been told by these Oregon State officials that it would be futile to pursue any type of administrative procedure or administrative remedy and that, in fact, no administrative procedures were available to your affiant or to his patients which could address this type of problem. Your affiant has further been told that no request for additional funding will be made by the State of Oregon for heavy care patients and, accordingly, your affiant has come to this Court for relief under the federal jurisdiction and pursuant to federal law.

Your affiant is unaware of any Oregon definition of "economy" or "efficiency" as those terms relate to costs necessarily incurred by a Medicaid provider of services who must comply with federal and state requirements.

However, your affiant can state with certainty that however economy and efficiency are measured, the Coos Bay Care Center is not being reimbursed for its care of Medicaid patients at a rate sufficient to meet the costs which must be incurred by this efficiently and economically operated provider in order to provide services pursuant to Title XIX and in conformity with applicable State and Federal laws, regulations and quality and safety standards. That is to say, the Coos Bay Care Center, in your affiant's opinion is very efficiently and economically operated, yet it is not being reimbursed by the State of Oregon at a rate sufficient to met its costs.

Further your affiant sayeth not.

DATED THIS — day of ————————, 1984.

ROBERT DECKER

SUBSCRIBED AND SWORN to before me this — day of ————————, 1984.

NOTARY PUBLIC FOR OREGON

Residing at: .....

My Commission Expires: .....

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25 day of July, 1984, a true and correct copy of the within and foregoing AFFIDAVIT OF ROBERT DECKER was mailed, via Federal Express, to Thomas K. Elden, OSB# 79036, Assistant Attorney General, 450 Justice Building, Salem, Oregon 97310.

/s/ Larry L. Grant for
Donald W. Lojek